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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 129

WILLIAM BENTVENA and WILLIAM STRUZZIERI,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

JOINT PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, ~~AND MOTION FOR STAY OF MANDATE AND CONTINUATION OF BAIL~~

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32 CASE PRESS INC., 421 Hudson St., N.Y.—ORegon 5-4540

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Statement

Petitioners, William Bentvena and William Struzzieri, each pray that this Court grant a rehearing of its order of October 10, 1966, denying their joint Petition for writ of certiorari and that a writ of certiorari be issued to review the judgment of the Court of Appeals for the Second Circuit in the above-entitled case as prayed for in the Petition for Writ of Certiorari herein. ~~The Petitioners also pray for a stay of mandate and continuation of bail.~~

The Petitioners herein, together with one Samuel Monastersky, were convicted of violations of 21 U.S.C. 173, 174. The Petitioner Bentvena's involvement is confined to a

violation which allegedly occurred on January 13, 1959 whereas Petitioner Struzzieri and the third defendant were allegedly involved in violations which occurred on January 6, 1959 and January 13, 1959.

On appeal to the Court of Appeals for the Second Circuit, both Petitioners urged that the judgments of conviction against them should be reversed because there was insufficient evidence of their guilt as a matter of law to warrant the submission of the case to the jury and that the indictments should have been dismissed by the Trial Court. The Circuit Court appeared at times to recognize such contention and at other times to confuse such contention with a motion to set aside a jury verdict of guilty as contrary to law and against the weight of evidence. In the latter instance, the Court presupposed that there was sufficient evidence of Petitioners' guilt for submission to the jury; whereas the thrust of the Petitioners' contention was that there was insufficient evidence of their guilt to be submitted to the jury. This was the issue raised by the Petition for Writ of Certiorari.

Reasons for Granting Rehearing and Issuing the Writ

The grounds for this Petition for rehearing are as follows:

On appeal to the Court of Appeals for the Second Circuit, the third defendant, Monastersky, contended that the built-in presumption of knowledge of illegal importation of narcotics arising from the possession thereof as provided in 21 U.S.C. 174 was inapplicable because the Government had failed to prove possession. His contention was rejected by the Court of Appeals. The Petitioners did not

raise such issue in the Court of Appeals. However, upon reflection, the Petitioners respectfully urge such contention as the grounds in support of this Petition.

The record does not show that the heroin allegedly sold to the agent was illegally imported or that either of the Petitioners knew from where it came. Hence, the conviction of the Petitioners can only stand if the Government proved they had "possession" of the heroin. Absent such proof of possession, the presumption created by Section 174 does not apply.

The Petitioners contend that the evidence fails to establish that either of them had actual possession or the power to control the disposition of the heroin. At best, they merely happened to be in the vicinity at the wrong time.

As to the alleged transaction of January 6, 1959, there is no proof of possession of narcotics by Petitioner Struzzieri. The testimony merely shows that Struzzieri had allegedly entered an apartment house at 525 East 88th Street, New York City carrying a blue wrapped package and left shortly thereafter without the package. However, there is no proof of what apartment he entered, who he met, what he did with the package, what was in the package, what happened to the package or whether it remained in the same condition. The testimony continues in this vein; that someone named McGovern left the building carrying a package, but this package is not described, that McGovern went to an apartment in another apartment building at 448 East 87th Street, New York City and that in such apartment he exhibited to agent Giorgio a package purportedly containing heroin, and left that apartment and delivered a brown wrapped package to agent Giorgio. There is a

complete lack of proof that Petitioner Struzzieri ever met McGovern or had been in the same apartment with him, or could have passed a package to him, or that the package allegedly carried by Struzzieri ever left the first building, or that the blue wrapped package which agent Giorgio saw Struzzieri carry into the first building was the same brown wrapped package which agent Mangioracina saw carried out of the second building, or whether they were the same package or different packages, or whether agent Giorgio ever received a package from McGovern in the second building, or that if it was the same package, that it was in the same condition and had the same contents, or that Struzzieri ever entered the second building.

The attention of this Court is respectfully invited to the conflicting testimony of the agents as to the alleged events of January 6th, 1959. Agent Giorgio testified that Struzzieri entered building 525 carrying a blue wrapped package and that later he purchased and obtained possession of a blue wrapped package from building 448.

Agent Mangiaracina's testimony is exactly contradictory and different, and repudiates agent Giorgio's story. He states that the package which Giorgio obtained from 448 was brown wrapped.

This testimony completely repudiates the prosecutor's claim of possession, because in effect agent Mangiaracina states that the package purportedly containing narcotics which Giorgio allegedly purchased was not the same package which Struzzieri had allegedly carried into a different building.

Hence inasmuch as there was no proof of possession by Struzzieri as a matter of law, the evidentiary inference of

unlawful importation and knowledge thereof should not have been permitted.

As to the events of January 13, there is likewise no proof of possession by either Struzzieri or Bentvena. The testimony discloses merely that Struzzieri allegedly removed a brown package from a car trunk and entered the apartment building at 525 East 88th Street, New York City and went upstairs. However, there is no proof as to which apartment, if any, they entered or approached, or that they ever had contact with McGovern, or that they entered or approached Apt. 2H. The testimony further alleges that McGovern was in Apt. 2H with agent Giorgio and that his doorbell rang and McGovern answered it and returned with a brown package purportedly containing heroin which Giorgio purchased.

Here again the evidentiary inference was inapplicable, because of the total absence of proof of possession as a matter of law.

Neither petitioner had possession as a matter of law; hence the Court should not have permitted the applicability of the evidentiary inference arising from "possession", that there was an illegal importation and that the petitioners had knowledge thereof.

Stay of the Mandate

The Petitioners are presently at liberty and it is respectfully requested that the mandate be stayed and that bail be continued pending the determination of this Petition. The Petitioner Bentvena is presently free on bail of $10,000.00 and Petitioner Struzzieri is presently free on bail of $15,000.00.

The Petitioner William Bentvena is 33 years of age, has been married about eight years, and is the father of two children. He resides with his wife and children at 21 Granada Avenue, Roosevelt, L.I. He has one prior conviction, in a State Court, for the misdemeanor of possession of marijuana, in which imposition of sentence was suspended (1957).

The Petitioner William Struzzieri has two prior State convictions, for bookmaking, about 20 years ago, which involved no imprisonment. He is 37 years old, he has been married (now divorced), and he resides with his mother, his sister and his sister's husband at 127 W. 16th Street, Richmond Hill, Queens.

Neither Bentvena nor Struzzieri can be considered bail risks. They have been under indictment in this case since 1960, they have gone through a long ordeal of successive trials and appeals, and they have invariably honored their obligations of appearing in Court whenever their presence has been required. These men are not hardened criminals, and they should be given their fair and normal opportunity to pursue the certiorari avenue of review.

It does not appear that the Government would be prejudiced by the granting of this motion for stay of mandate and continuation of bail pending certiorari. This Court has already determined that Bentvena and Struzzieri were not proved to have been members of the narcotics conspiracy charged in the same indictment herein, in *United States* v. *Bentvena,* 319 F. 2d 916 (C. A. 2 1963), cert. denied 375 U.S. 940. Their convictions in the instant trial were on substantive charges not importing those graver conspiratorial involvements. The comparatively moderate bail

under which they are presently free suggests that the Court below, which was in a position to evaluate the situation, did not regard Bentvena and Struzzieri as "dangerous", from the standpoint of bail risk.

CONCLUSION

For the reasons set forth above and in the Petition for Writ of Certiorari, it is respectfully urged that rehearing be granted and that upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Second Circuit and that the issuance of the mandate be stayed and bail continued.

Respectfully submitted,

IRWIN KLEIN
Attorney for Petitioners
William Bentvena and
William Struzzieri

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

IRWIN KLEIN
Attorney for Petitioners
William Bentvena and
William Struzzieri